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No. 88-2123

In the Supreme Court of the United States

OCTOBER TERM, 1989

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Title VII of the Civil Service Reform Act of 1978 governs labor relations between federal agencies and their employees. The question presented is whether that statute requires an agency to negotiate over a union proposal that, if incorporated into the agency's collective bargaining agreement, would subject to grievance and to arbitration the claims of agency employees and their unions that the agency's contracting-out determinations failed to comply with OMB Circular No. A-76.

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OPINIONS BELOW

The decision of the Federal Labor Relations Authority (Pet. App. 10a-18a) is reported at 27 F.L.R.A. 976. The decision of the court of appeals (Pet. App. 1a-9a) is reported at 862 F.2d 880.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on December 2, 1988. A petition for rehearing was denied on February 28, 1989 (Pet. App. 21a). On May 22, 1989, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 28, 1989. The petition for a writ of certiorari was filed on that date, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. 7103(a) provides in relevant part:

(9) "grievance" means any complaint –

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee labor organization, or agency concerning –

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. 7106 provides in relevant part:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency –

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws –

(A) to hire, assign, direct, layoff, and retain employees in the agency, * * *;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments * * *; or

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating –

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7117(a)(1) provides:

Subject to paragraph (2) of this subsection [relating to agency-specific regulations], the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

5 U.S.C. 7121 provides in relevant part:

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall

provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall –

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that –

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

STATEMENT

A. Background

1. The Federal Sector Labor Management Relations Scheme

Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, provides a "comprehensive • • • scheme governing labor relations between federal agencies and their employees."[1] *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 91 (1983).[2] As part of this scheme, the statute expressly recognizes the right of federal employees to form and join unions (see, *e.g.*, 5 U.S.C. 7102), and imposes upon management officials of federal agencies a duty to bargain with their employees' unions regarding conditions of employment. See *FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. 1261, 1261 (1988); *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92; 5 U.S.C. 7103(a)(12), 7114(a)(4), 7116(a)(5), 7117. "[C]onditions of employment" include "personnel policies, practices, and matters • • • affecting working conditions." 5 U.S.C. 7103(a)(14).

"Recognizing 'the special requirements and needs of the Government,' § 7101(b), Title VII exempts certain matters from the duty to negotiate." *FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. at 1261. In particular, 5 U.S.C. 7106 provides that "nothing in this chapter shall affect the authority of any management official of any agency" with respect to certain enumerated "management rights."[3] See

[1] Title VII of the Civil Service Reform Act is also known as the Federal Service Labor-Management Relations Statute.

[2] Title VII does not cover certain federal employees (*e.g.*, members of the military and the Foreign Service), or certain federal agencies (*e.g.*, the Federal Bureau of Investigation and the Central Intelligence Agency). 5 U.S.C. 7103(a)(2) and (3).

[3] The authority reserved to management in 5 U.S.C. 7106(a) is "[s]ubject to subsection (b) of this section." 5 U.S.C. 7106(b) specifies

H.R. Rep. No. 1403, 95th Cong., 2d Sess. 43 (1978) (Section 7106 "place[s] limits on the number of subjects about which agency management may bargain with a labor organization"). The reserved management rights listed in Section 7106 specifically include management's "authority * * * in accordance with applicable laws * * * to make determinations with respect to contracting out" (5 U.S.C. 7106(a)(2)(B)).[4]

The statute provides a mechanism for resolving negotiability disputes. If management officials decline to negotiate over a union's bargaining proposal, believing "that the duty to bargain in good faith does not extend to [such] matter" (5 U.S.C. 7117(c)(1)), the union may file a negotiability appeal with the Federal Labor Relations Authority. See 5 U.S.C. 7105(a)(2)(E), 7117(c). The FLRA then decides whether or not the union's proposal is subject to the bargaining obligation. 5 U.S.C. 7117(c)(6); see *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 93.[5]

If the FLRA determines that a union's proposal is subject to the bargaining obligation, that determination has significant consequences. The determination does not, in and of itself, result in the insertion of the proposed provi-

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that the management rights provision does not "preclude any agency and any labor organization from negotiating" with regard to the "procedures which management officials of the agency will observe in exercising any authority under this section" and with regard to "appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials."

[4] Title VII also precludes an agency from bargaining over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation," and over "matters which are the subject of * * * a Government-wide rule or regulation" (5 U.S.C. 7117(a)(1)).

[5] The FLRA's rulings on negotiability are reviewable in the courts of appeals under 5 U.S.C. 7123. That provision is the jurisdictional basis for this suit.

sion into the collective bargaining agreement; it simply requires the parties to bargain in good faith over whether to include the provision. But if negotiation eventually reaches an impasse, "either party may request the Federal Service Impasses Panel to consider the matter." 5 U.S.C. 7119(b)(1). The Federal Services Impasses Panel is empowered to "take whatever action is necessary * * * to resolve the impasse" (5 U.S.C. 7119(c)(5)(B)(iii)), including the imposition of contract terms upon the parties. See, *e.g.*, *National Federation of Federal Employees* v. *FLRA*, 789 F.2d 944, 945 (D.C. Cir. 1986); *National Treasury Employees Union* v. *FLRA*, 712 F.2d 669, 671 n.5 (D.C. Cir. 1983). "Thus, it is possible that a proposal held negotiable by the FLRA may be imposed on the parties by the Federal Service Impasses Panel in the event the agency and the union do not ultimately agree." *Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187, 1189 n.1 (7th Cir. 1983); accord *HHS* v. *FLRA*, 844 F.2d 1087, 1089 (4th Cir. 1988) (en banc).[6]

In addition to setting forth a duty to bargain, the statute commands that all collective bargaining agreements in the federal sector "shall provide procedures for the settlement of grievances." 5 U.S.C. 7121(a)(1). With certain exceptions not pertinent here, these negotiated grievance procedures "shall be the exclusive procedures for resolving grievances" (*ibid.*). Collective bargaining agreements must "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to bind-

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[6] Title VII's collective bargaining regime is in this fundamental respect quite different from the framework established under the National Labor Relations Act, which does not provide for an entity empowered to resolve bargaining impasses by ordering the incorporation of the contested proposal into the parties' collective bargaining agreement.

ing arbitration which may be invoked by either the [union] or the agency." 5 U.S.C. 7121(b)(3)(C).

"Grievances" are defined in 5 U.S.C. 7103(a)(9) to mean complaints by employees and unions "concerning any matter relating to the employment" of an employee (5 U.S.C. 7103(a)(9)(A) and (B)), complaints concerning the effect, interpretation, or alleged breach of the collective bargaining agreement (5 U.S.C. 7103(a)(9)(C)(i)), and "any complaint * * * by any employee labor organization, or agency concerning * * * any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment" (5 U.S.C. 7103(a)(9)(C)(ii)).

2. OMB Circular No. A-76

Office of Management and Budget Circular No. A-76 "establishes Federal policy regarding * * * whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel." App. A, *infra*, para. 1.[7] The Circular provides that, although [c]ertain functions [which] are inherently Governmental in nature * * * shall be performed by Government employees" (App. A, *infra*, para. 5b), it is "the general policy of the Government to rely on commercial sources to supply the products and services the Government needs" (*id.* para. 4a). But government performance of a commercial activity[8] is appropriate, *inter alia*, "if a cost comparison prepared in accordance with * * * the Supplement [see note 7, *supra*] demonstrates that the Government is operating or can operate the activity on an ongoing basis at an estimated lower cost than a qualified commercial source" (App. A, *infra*, para. 8d). Accordingly, and subject only to limited exceptions, "[w]henever commercial sector performance of a Government operated commercial activity is permissible, in accordance with [the] Circular and its Supplement, comparison of the cost of contracting and the cost of in-house performance shall be performed to determine who will do the work" (*id.* para. 5a.).[9] The Supplement directs Executive Branch agencies to "evaluate all agency activities and functions to determine which are Governmental functions * * * and which are commercial activities." Supplement at I-1. With respect to those activities found to be commercial, the Supplement provides instructions for conducting a cost comparison to determine whether it would be cheaper to perform the activity in-house or to contract out the activity to the private sector. Supplement, Part IV.

In order "to provide an administrative safeguard to ensure that agency decisions are fair and equitable and in ac-

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[7] The Circular was originally issued as a Bureau of the Budget Bulletin in 1955. The current version, relevant portions of which are reprinted in Appendix A, *infra*, was issued in 1983. (Copies of the complete Circular have been lodged with the Clerk of this Court.) The Circular, which is signed by the Director of OMB and is addressed to the heads of Executive Branch agencies, is accompanied by a Supplement that sets forth the steps to be taken by agency officials to implement the Circular's general policy. We have lodged copies of the Supplement with the Clerk of this Court, and have reproduced one portion of it (Part I, Chapter 2, Section I) in Appendix B, *infra*.

[8] A commercial activity is "one which is operated by a Federal executive agency and which provides a product or service which could be obtained from a commercial source"; in contrast, a governmental function is one that is "so intimately related to the public interest as to mandate performance by Government employees." App. A, *infra*, para. 6a and e.

[9] Cost comparisons are not required when the activity being considered for contracting out involves ten or fewer work years and "fair and reasonable prices" can be obtained from qualified commercial sources, or when effective price competition is available and there is no reasonable expectation that in-house operation will be less expensive. Supplement at I-11, I-1 & n.1.

cordance with [applicable] procedures," the Circular and its Supplement direct each covered agency to establish an administrative appeals procedure to resolve complaints by employees, unions, or bidders directly affected by certain decisions. App. B, *infra*; see also App. A, *infra*, paras. 6g, 9d. In particular, the procedure is required to resolve questions relating to (1) determinations resulting from cost comparisons and (2) decisions to convert to contract without a cost comparison (App. B, *infra*, para. 1).[10] Complaints must ordinarily be filed within 15 working days of receipt of the agency's decision,[11] and appeals must be resolved within 30 calendar days of filing. *Id.* paras. 3, 6. "The original appeal decision shall be final unless the agency procedures provide for further discretionary review within the agency." *Id.* para. 3.

The Circular expressly provides that it does not "[e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in" the Supplement's administrative appeal procedures. App. A, *infra*, para. 7c(8). The Supplement correspondingly states that the required internal appeal procedure "does not authorize an appeal outside the agency or a judicial review" (App. B, *infra*, para. 2), and that "the procedure and the decision upon appeal may not be subject to negotiation, arbitration, or agreement" (*id.* para. 7).

[10] The Circular provides that the required administrative appeals procedure shall not apply to questions regarding government management decisions. App. B, *infra*, para. 1b.

[11] When an initial cost comparison decision is announced, any directly affected employee, union, or bidder is entitled upon request to receive "[a]ll detailed documentation supporting [that] decision". App. B, *infra*, para. 4. The appeal must be filed within 15 working days after the directly affected party receives the documentation (*ibid.*). The 15-working-day appeal period may be extended to 30 working days in cases where the cost data are particularly complex. *Id.* para. 6a.

3. The EEOC Litigation

In *American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and EEOC*, 10 F.L.R.A. 3 (1982), the FLRA held that the following proposal was subject to the statutory bargaining obligation: "The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out." The Authority rejected the agency's argument that negotiation over the union's proposal would improperly impinge upon management's reserved authority "to make determinations with respect to contracting out" (5 U.S.C. 7106(a)(2)(B)). The Authority reasoned that "[t]he proposal would require management to exercise its right to make contracting out determinations in accordance with whatever applicable laws and regulations exist at the time of such action. Hence, it would contractually recognize external limitations on management's right but would not establish, either expressly or by incorporation, any particular substantive limitations on management." 10 F.L.R.A. at 3. The Authority stated that "[s]uch a proposal would only require that when management acts, it does so in accordance with applicable OMB directives existing at the time." 10 F.L.R.A. at 4.

The EEOC objected that if the union's proposal were to find its way into the collective bargaining agreement, complaints alleging agency failure to abide by the terms of OMB Circular No. A-76 would be subject to the collective bargaining agreement's grievance and arbitration machin-

ery (see 5 U.S.C. 7103(a)(9)(C)(i)) and would thus allow arbitrators to decide whether the agency's management officials were in compliance with the Circular's dictates. The Authority responded "that the Agency has misinterpreted the legal effect of the disputed proposal: the proposal would not itself change the scope and coverage of the parties' grievance procedure." 10 F.L.R.A. at 5. Relying on the definition of "grievance" as including a claimed "misapplication of a law, rule or regulation affecting conditions of employment" (5 U.S.C. 7103(a)(9)(C)(ii)), the Authority concluded that the union's bargaining proposal was essentially superfluous. It reasoned that in view of this definition, "even in the absence of the contract provision proposed by the Union, disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure" (10 F.L.R.A. at 5).[12]

A divided panel of the United States Court of Appeals for the D.C. Circuit essentially adopted the FLRA's analysis and upheld its ruling. *EEOC* v. *FLRA*, 744 F.2d 842 (1984). The EEOC sought review in this Court of the court of appeals' decision, arguing that the court of appeals erred in assuming that OMB Circular No. A-76 is an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2) and a "law, rule, or regulation" for purposes of the definition of "grievance" in 5 U.S.C. 7103(a)(9)(C)(ii). This Court granted the agency's petition for a writ of certiorari, but subsequently dismissed the writ as improvidently granted. *EEOC* v. *FLRA*, 476 U.S. 19 (1986). The

[12] The FLRA similarly rejected management's claim that negotiation over the union's proposal was barred because such negotiation "would conflict with OMB Circular No. A-76, itself." 10 F.L.R.A. at 4. The FLRA stated that the Circular cannot "limit the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure." *Ibid.*

Court explained that the agency's arguments that OMB Circular No. A-76 is neither an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2)(B) nor a "law, rule, or regulation" within the meaning of 5 U.S.C. 7103(a)(9)(C)(ii) had not been raised before or addressed by either the court of appeals or the FLRA. *EEOC* v. *FLRA*, 476 U.S. at 22-24. Thus, since the "central issues" in the case had not been raised or passed upon below, the Court "decline[d] to consider them." *Id.* at 24.[13]

B. Proceedings in the Present Case

1. The FLRA Decision

During negotiations with the agency, respondent National Treasury Employees Union, representing employees of the Internal Revenue Service, submitted the following bargaining proposal: "The Internal Appeals Procedure [for challenging determinations made pursuant to OMB Circular No. A-76] shall be the parties' grievance and arbitration provisions of the Master Agreements [*i.e.*, the relevant collective bargaining agreements]." Pet. App. 10a. The agency declined to bargain over the proposal, asserting among other things that the proposal was exempt from the bargaining obligation by virtue of the management rights provision, 5 U.S.C. 7106. The union brought a

[13] Justice White and Justice Stevens dissented from the Court's decision to dismiss the writ of certiorari as improvidently granted. *EEOC* v. *FLRA*, 476 U.S. at 25 (White, J., dissenting); *id.* at 25-27 (Stevens, J., dissenting). Justice Stevens stated that, on the merits, he would rule in management's favor (*id.* at 27):

> I am persuaded that Circular A-76 is not one of the "applicable laws" described in 5 U.S.C. § 7106(a)(2)(B) and that requiring compliance with the Circular would intrude on management's reserved rights. Accordingly, I would reverse the judgment of the Court of Appeals.

negotiability appeal before the FLRA, which ruled that the proposal was negotiable. Pet. App. 10a-15a.[14]

Reiterating the conclusion of its *EEOC* decision,[15] the FLRA asserted that the union's proposal was essentially superfluous. The FLRA stated that the proposal was negotiable, and did not trespass upon management's reserved authority to make determinations with respect to contracting out since, under the statute, the agency's decisions made pursuant to OMB Circular No. A-76 would be subject to grievance and arbitration "even in the absence"

[14] The FLRA decision simply required the agency to bargain over the union's proposal to subject to the collective bargaining agreement's grievance and arbitration provision agency contracting-out decisions made pursuant to OMB Circular A-76. Title VII provides, however, that if the union and management ultimately fail to reach agreement with respect to the proposal, either party may ask the Federal Service Impasses Panel to resolve the impasse, and the Impasses Panel may put the union's proposal into effect. See pp. 6-7, *supra*. If the union's proposal were to be incorporated into the collective bargaining agreement, disputes about the propriety of management's contracting-out decisions under the A-76 Circular would be subject to the collective bargaining agreement's grievance mechanism, and, ultimately, to resolution by an independent arbitrator. See 5 U.S.C. 7103(a)(9)(C) (i), 7121(b)(3)(C); *HHS* v. *FLRA*, 844 F.2d at 1092.

[15] The FLRA recognized that the Ninth Circuit had since "rejected the Authority's approach in *EEOC*," in *Defense Language Institute* v. *FLRA*, 767 F.2d 1398 (9th Cir. 1985), cert. dismissed, 476 U.S. 1110 (1986), but the Authority nevertheless "respectfully adhere[d] to the view that [its own] position in *EEOC* is correct." Pet. App. 14a n.1. In addition to its decision in *EEOC*, the FLRA also relied significantly on its decision in *American Federation of Government Employees, AFL-CIO, Local 1923 and Department of Health and Human Services, Office of the Secretary, Office of the General Counsel, Baltimore, Maryland*, 22 F.L.R.A. 1071 (1986), in which the FLRA held negotiable a proposal similar to those at issue in *EEOC* and in the present case. That decision has since been set aside by the Fourth Circuit. *HHS* v. *FLRA*, 844 F.2d 1087 (1988) (en banc).

of a negotiated provision to that effect in the collective bargaining agreement. Pet. App. 15a. More specifically, the FLRA indicated, a union's complaint that an agency's contracting-out decision was in violation of the Circular would constitute a "grievance" as that term is defined in 5 U.S.C. 7103(a)(9)(C)(ii): "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." See Pet. App. 13a. In the FLRA's view, grievances alleging a failure to abide by the Circular would not unduly intrude upon management's reserved rights because "such grievances require nothing that is not required by section 7106(a)(2) of the Statute itself, namely, that determinations as to contracting-out must be made 'in accordance with applicable laws.' " Pet. App. 15a (quoting 5 U.S.C. 7106(a)(2)).[16]

2. The Court of Appeals Decision

a. The agency filed a petition for review in the D.C. Circuit, arguing that the FLRA's decision was contrary to the statute because negotiation over the union's proposal would violate the management rights provision. Expressly raising the issues that this Court held were not timely

[16] The FLRA also held negotiable a second proposal advanced by the union. That proposal specified that the agency would not award a contract "until all grievance procedures, up to and including arbitration, are exhausted in regard to any provisions (*e.g.*, OMB Circular A-76, Statute) pertaining to the impact and implementation of a contracting-out decision." Pet. App. 16a. The FLRA explained (*ibid.*), "Proposal 2 provides that the Agency shall wait until all grievances concerning the impact and implementation of a contracting-out determination have been exhausted through the grievance and arbitration procedures before awarding any contract." The FLRA concluded that Proposal 2 was subject to the bargaining obligation because it suggested a negotiable "procedure" within the meaning of 5 U.S.C. 7106(b)(2). Pet. App. 16a-18a.

raised in *EEOC*, the agency contended that the FLRA's reasoning was flawed because OMB Circular No. A-76 is neither an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2) nor a "law, rule, or regulation" within the meaning of 5 U.S.C. 7103(a)(9)(C)(ii). Thus, the agency argued, arbitral review of alleged violations of the Circular would encroach upon management's reserved authority "to make determinations with respect to contracting out" (5 U.S.C. 7106(a)(2)(B)).

The panel, over a dissent by Judge D.H. Ginsburg, upheld the FLRA's ruling. Pet. App. 1a-9a. The panel recognized that the agency had explicitly raised the questions whether OMB Circular No. A-76 is an "applicable law" or a "law, rule, or regulation" within the meaning of 5 U.S.C. 7106(a)(2) and 7103(a)(9)(C)(ii) respectively. Pet. App. 5a. The panel did not discuss the merits of these questions, however, because it "f[ou]nd this case to be governed by" *EEOC* v. *FLRA*, 744 F.2d 842 (D.C. Cir. 1984), cert. dismissed, 476 U.S. 19 (1986). Pet. App. 4a.[17] Accordingly, the panel regarded itself as powerless to avoid a conflict with the Fourth and Ninth Circuits, both of which had disagreed with the D.C. Circuit's decision in *EEOC* (see *HHS* v. *FLRA*, 844 F.2d 1087 (4th Cir. 1988) (en banc); *Defense Language Institute* v. *FLRA*, 767 F.2d 1398 (9th Cir. 1985), cert. dismissed, 476 U.S. 1110 (1986)). Pet. App. 6a.[18]

[17] The panel recognized that neither the "applicable law" issue nor the "law, rule, or regulation" issue had been "consider[ed] or decid[ed]" (Pet. App. 5a) in *EEOC*; it also recognized (*ibid.*) that this Court had dismissed the writ of certiorari as improvidently granted in *EEOC* precisely because the "applicable law" and "law, rule, or regulation" arguments "had never been made before either the FLRA or [the court of appeals]" in that case. The panel held, nevertheless, that the court of appeals' prior decision in *EEOC* was controlling, since "[w]e do not • • • find an intellectually legitimate basis to distinguish *EEOC* from this case." *Ibid.* Thus, the panel concluded, "[t]he [agency's] new arguments are merely that" (*id.* at 5a-6a), and the outcome of this case was dictated by *EEOC*.

In dissent, Judge Ginsburg rejected the majority's premise that the court of appeals' decision in *EEOC* was controlling, and thus addressed the merits of the agency's claim. Pet. App. 8a-9a. Citing the Fourth Circuit's decision in *HHS* v. *FLRA*, 844 F.2d 1087 (1988) (en banc), he concluded "that the Circular is neither an 'applicable law' nor a 'law, rule, or regulation' and that [the union's] proposal to subject contracting-out decisions to grievance procedures is therefore non-negotiable." Pet. App. 9a.[19]

b. The court of appeals denied the agency's petition for rehearing with suggestion for rehearing en banc. Pet. App. 21a-25a. Judge D.H. Ginsburg, joined by Judges Williams and Sentelle, issued a separate statement concurring in the denial of rehearing en banc. Judge Ginsburg stated that although "there [is] a split in the circuits" and "[b]oth the Fourth and the Ninth Circuits have decided • • • contrary to our panel," "I think it would be a poor use of our resources to rehear this matter *en banc*," since

[18] The panel stated, however, that it was not "constrained [by *EEOC*] with respect to [the union's] second proposal" (Pet. App. 6a), which would stay execution of the agency's contracting-out determinations until the exhaustion of grievance and arbitration. See note 16, *supra*. The panel set aside the FLRA's ruling that the union's second proposal was negotiable. Pet. App. 6a-7a. The panel determined that the second proposal "encroaches entirely too far upon management's authority to accomplish its agency's mission with dispatch" (*id.* at 6a), since "delay alone could compromise the managerial judgment involved in procuring products or services necessary to the agency's mission when they are needed" (*id.* at 7a). That determination is not challenged in this Court.

[19] Judge Ginsburg agreed with the other members of the panel that the union's second proposal was not negotiable. Pet. App. 8a.

"[i]t is likely that the Supreme Court will want to resolve this question." *Id.* at 25a.[20]

SUMMARY OF ARGUMENT

The question presented in this case is whether a federal agency has a statutory obligation to negotiate over a union proposal that, if incorporated into the collective bargaining agreement, would subject to grievance and to arbitration the claims of agency employees and their unions that the agency's contracting-out determinations failed to adhere to OMB Circular No. A-76. As both the Fourth Circuit and the Ninth Circuit have concluded, the answer to that question is no.

1. In enacting Title VII, Congress gave federal employees the rights to negotiate with their employing agencies over conditions of employment and to submit grievances to binding arbitration. At the same time, it was careful to preserve to responsible agency officials the prerogatives necessary for the effective and efficient conduct of government business, among which Congress specifically identified the authority "to make determinations with respect to contracting out" (5 U.S.C. 7106(a)(2)(B)). The means Congress chose to safeguard those prerogatives was the management rights provision incorporated in 5 U.S.C. 7106, which states in relevant part that "nothing in this chapter [Title VII] shall affect the authority of any management official of any agency • • • in accordance with applicable laws" to make specified decisions concerning the hiring and assignment of responsibilities to agency personnel, and, specifically, "to make determinations with respect to contracting out." The management rights provision is accordingly both broad in its protective effects and

[20] Judge Silberman issued a separate statement, also concurring in the denial of rehearing en banc. Pet. App. 24a.

specific in its application to determinations relating to contracting out.

Respondents nevertheless contend that the provision does not bar the negotiation of the instant proposal. They argue that Circular A-76 is an "applicable law" that qualifies management's reserved right with respect to contracting out, and therefore the union proposal, in requiring compliance with Circular A-76, does not "affect" that right in violation of the statute. Respondents also argue that a complaint alleging a failure to adhere to the Circular constitutes a "grievance" as that term is defined in 5 U.S.C. 7103(a)(9)(C)(ii): "[a complaint concerning] any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."

Respondents' theory is wrong, however, because Circular A-76 is not an "applicable law" within the meaning of 5 U.S.C. 7106. The Circular is not a law at all; it is instead a management tool—a statement of executive branch policy that does not have the force and effect of law. By its express terms, the Circular makes clear that it is not intended to give rise to any legally enforceable rights and obligations. Moreover, its application turns so largely on the exercise of managerial judgment and managerial discretion that the courts have consistently recognized that it provides no judicially enforceable rights.

A complaint by a union or an employee that an agency has failed to adhere to the Circular in making a contracting-out determination does not constitute a "grievance" within the meaning of Title VII. Both the context of the statutory provisions and the policy behind them demand that if the Circular is not an "applicable law" that qualifies management's reserved authority under 5 U.S.C. 7106, it is not a "law, rule, or regulation" within the definition of "grievance" in 5 U.S.C. 7103(a)(9)(C)(ii).

Grievances are ultimately subject to binding arbitration under 5 U.S.C. 7121(b)(3)(C), and binding arbitration regarding management's adherence to the Circular would improperly intrude upon management's reserved right. The implementation of Circular A-76 turns so largely on the exercise of managerial discretion that arbitrators' review of agencies' A-76 determinations would pose an unacceptable risk of substituting arbitrators' judgment for that of agency managers, making arbitrators, instead of agency management officials, the ultimate authority on contracting-out matters. Moreover, arbitral review of contracting-out decisions would also "affect" reserved agency authority in violation of Section 7106 by increasing uncertainties and delays in implementing contracting-out decisions, thus increasing the cost of government operations.

The conclusion that complaints concerning the implementation of Circular A-76 do not constitute grievances under Title VII is underscored by the unequivocal statement in the statute that "nothing in this chapter"—including the statute's grievance and arbitration provisions—"shall affect" the authority reserved to management in the management rights provision. 5 U.S.C. 7106(a).

2. The statutory purpose confirms the plain meaning of the management rights provision. Congress emphasized in the statute itself that its terms are to be interpreted in light of "the requirement of an effective and efficient Government" (5 U.S.C. 7101(b)). As noted above, subjecting determinations regarding contracting out to grievance and arbitration would impede, rather than facilitate, efficiency and effectiveness. In addition, respondents' interpretation of Title VII would impair the President's ability to manage the use of Executive Branch contracting-out authority through policy directives from the Office of Management and Budget. Under that interpretation, the

President could not provide agency management officials with guidelines on how to go about exercising that authority without by that very action giving agency employees a right to police, and independent arbitrators the ultimate authority to construe and apply, those guidelines. There is no justification for such a reading of a statute that is specifically designed to preserve management prerogatives necessary for the effective supervision of agency operations.

ARGUMENT

I. THE DECISION BELOW IS INCONSISTENT WITH THE MANAGEMENT RIGHTS PROVISION OF TITLE VII

In Title VII, Congress had two objectives: to maintain agency management's ability to conduct the business of the agency effectively and at the same time to give federal employees and their unions the right to bargain over conditions of employment and to submit grievances to binding arbitration.

The management rights provision, 5 U.S.C. 7106, is crucial to the reconciliation of these objectives. It provides in relevant part that "nothing in [Title VII] shall affect the authority of any management official of any agency * * * to determine the mission, budget [and] organization * * * of the agency; and, in accordance with applicable laws * * * [to make specified types of personnel decisions and] to make determinations with respect to contracting out." As the Fourth Circuit recognized (*HHS* v. *FLRA*, 844 F.2d 1087, 1090 (1988) (en banc)), "[i]t would have been difficult, if not impossible, for Congress to choose more emphatic or comprehensive language in drafting the management rights clause." Indeed, the legislative history of Title VII confirms that a strong management rights provision was an "important element" of the overall statutory

design (124 Cong. Rec. 29,197 (1978) (remarks of Rep. Ford); cf. *id.* at 25,601 (remarks of Rep. Clay)), a design that sought, while recognizing the collective bargaining rights of federal employees, to "insure[ ] to Federal agencies the right to manage government operations efficiently and effectively" (S. Rep. No. 969, 95th Cong., 2d Sess. 12 (1978)). See *Cornelius* v. *Nutt*, 472 U.S. 648, 662 (1985) ("one of the major purposes of [Title VII] was to 'preserv[e] the ability of federal managers to maintain "an effective and efficient Government" ' " (citations omitted)).

The management rights provision was intended to "preserve[ ] for agency managers the right to keep off the bargaining table those prerogatives which [Congress] believe[d] [to be] essential for them to manage effectively" (124 Cong. Rec. 24,286 (1978) (remarks of Rep. Clay)), and one of those "essential" "prerogatives" is the "authority * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B).[21] The management rights provision is thus not only broad in its protection of the rights identified, but also specific in its identification of decisions concerning contracting out as one of the covered management prerogatives.[22]

Despite the clear import of the statute, respondents contend, and the court below held (in *EEOC* v. *FLRA*, 744 F.2d at 848-851), that agency compliance with Circular

[21] Accordingly, contracting out is one of the "areas of management authority which may not be subject to collective bargaining" (H.R. Rep. No. 1403, *supra*, at 43; accord H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 154 (1978); 124 Cong. Rec. 24,286 (1978) (remarks of Rep. Clay)).

[22] The specific and complete statutory exclusion of contracting out from the scope of mandatory bargaining in Title VII thus stands in sharp contrast to the rules applicable in the private sector. See *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964); *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981).

A-76 is a proper subject for negotiation under Title VII. They argue that requiring such compliance in a collective bargaining agreement is consistent with the management rights provision because it will not "affect the authority of [the agency's] management official[s]" to make decisions regarding contracting out "in accordance with applicable laws." In light of the "applicable laws" proviso, the argument runs, the statute contemplates that a dispute over whether the agency has "violat[ed], misinterpret[ed] or misappli[ed]" Circular A-76 is a "grievance" as defined in Section 7103(a)(9)(C)(ii), and thus subject to compulsory arbitration under Section 7121(a)(1). The argument then concludes that since incorporating a provision requiring compliance with Circular A-76 in the collective bargaining agreement would give agency employees and their unions nothing they do not already have under the statute itself, there is no impermissible "[e]ffect [on] the authority of [agency] management official[s]," and the agency may be required to negotiate over such a provision.[23] For the reasons stated below, we believe this argument must be rejected because both of its premises are incorrect.

[23] If the union agrees with this analysis, it is hard to see why it made the contested proposal in the first place, since it has no more to gain by its inclusion in the collective bargaining agreement than the agency has to lose by that inclusion. See *Defense Language Institute* v. *FLRA*, 767 F.2d at 1402 ("we find it incredible that the parties would so strenuously dispute a proposal that gives the union nothing it did not already possess and deprives management of nothing it had not already lost"); *EEOC* v. *FLRA*, 744 F.2d at 852 (MacKinnon, J., dissenting) (union bargaining proposal would be "a total nullity"); *HHS* v. *FLRA*, 844 F.2d at 1097.

A. Circular A-76 Is Not An "Applicable Law" Under Section 7106[24]

Circular A-76 cannot be an "applicable law," since it is not a law at all; as is typical of OMB Circulars,[25] it is designed solely as a management tool—to establish executive branch policies and to provide guidelines to agencies for their implementation. The Circular itself so states, App. A, *infra,* para. 1; it further emphasizes that it does not "[e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular." *Id.* para. 7c(8). This limitation has been recognized by the

[24] Significantly, every judge to have discussed the question has agreed with this assertion. In *EEOC* v. *FLRA, supra,* only Justice Stevens addressed the merits; he concluded that the Circular is not an "applicable law." 476 U.S. at 27. In *HHS* v. *FLRA,* 844 F.2d 1087, 1094-1095, 1096 (4th Cir. 1988) (en banc), the majority squarely held that the Circular is not an "applicable law"; the dissenters declined to consider the question—in their view, it was not properly before the court (see *id.* at 1102 (dissenting opinion)). Finally, in the instant case, Judge Ginsburg in dissent stated expressly that he was of the view that the Circular is not an "applicable law." Pet. App. 9a. Although the panel majority rejected the agency's contention that the Circular is not an "applicable law" (Pet. App. 5a-6a), it did so simply on the ground that it was bound by the prior Circuit decision in *EEOC* v. *FLRA,* 744 F.2d 842 (D.C. Cir. 1984). Cf. *National Federation of Federal Employees* v. *Cheney,* 883 F.2d 1038, 1062-1063 (D.C. Cir. 1989) (Mikva, J., dissenting). As the majority acknowledged (Pet. App. 5a), and as this Court squarely held in its opinion dismissing the writ of certiorari as improvidently granted (476 U.S. at 24), *EEOC* v. *FLRA* did not consider the question whether the Circular is an "applicable law."

[25] "In carrying out its responsibilities, the Office of Management and Budget issues policy guidelines to Federal agencies to promote efficiency and uniformity in Government activities. These guidelines are normally in the form of circulars." 5 C.F.R. 1310.1.

federal courts. See, *e.g., AFGE, Local 2017* v. *Brown,* 680 F.2d 722, 726 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); *HHS* v. *FLRA,* 844 F.2d at 1096; see also S. Rep. No. 144, 96th Cong., 1st Sess. 4 (1979) (referring to Circular A-76 as expressing "executive branch policy").

As the D.C. Circuit itself has noted, in determining whether the "applicable laws" proviso limits a particular authority reserved under the management rights provision, "[i]t it not enough * * * for the union to point to [supposed] limitations on management's power * * *. The union must demonstrate further that the [alleged] limitation was intended to qualify management authority in favor of union participation; and that the participation proposed for the union will not expand any statutory restriction on management." *National Federation of Federal Employees, Local 1745* v. *FLRA,* 828 F.2d 834, 839 n.30 (1987). Circular A-76, by its terms, is not so intended.

The very nature of Circular A-76 demonstrates that it is not an "applicable law." Its implementation entails, first and foremost, the exercise of agency "judgment and discretion" (*HHS* v. *FLRA,* 844 F.2d at 1092). The Circular expressly provides, for example, that the threshold step in the contracting-out analysis—determining whether the activity under consideration is "governmental" or "commercial"—is to be made "us[ing] informed judgment." App A, *infra,* Attachment A, n.1. Similarly, in determining the configuration of government employees and resources that will lead to the most efficient in-house performance (Supplement at I-12, III-1, IV-2), management is specifically directed to use its "own management techniques." *Id.* at III-1. As the Ninth Circuit concluded, these and other determinations called for in the Circular "inevitably involve 'questions of judgment requiring close analysis and nice choices' which are properly committed to the in-

formed discretion of management." [26] *Defense Language Institute* v. *FLRA*, 767 F.2d at 1401 (quoting *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958)). See *HHS* v. *FLRA*, 844 F.2d at 1092-1094.

This breadth of judgment and discretion also pervades those aspects of the Circular that are subject to the internal appeals procedure (see App. B, *infra*; pp. 9-10, *supra*)—aspects that, under the proposal at issue here, would be subjected to a radically different process and to external adjudication. Thus an agency's decision to contract out without a cost comparison may be based on its conclusion that the in-house operation has no "reasonable expectation" of winning such a comparison (Supplement at I-11). With respect to cost comparisons themselves, they must frequently be based on the estimates of the agency's ex-

[26] The nature of the Circular as a managerial tool, rather than an enforceable "applicable law," is exemplified by Part III of the Supplement, denominated "Management Study Guide." "The management study [that is mandated consists of] a major management analytical evaluation of [the] organization to determine if the job can be accomplished in a more economical manner." Supplement at III-2. The "Management Study Guide" directs responsible management officials, in order to decide whether the particular activity should be contracted out, to analyze the activity and define its "essential mission." *Ibid.*; see *id.* at III-7. Management officials are then directed to make a number of other determinations, including identification of the activity's "optimum organizational structure" (*ibid.*), which in turn requires an assessment of whether "authority and accountability [are] properly balanced in the organization's [present] hierarchical structure" (*id.* at III-8), and whether the activity's present personnel structure is "the most effective and economical based on [the] work to be performed" (*ibid.*). As the functions called for in the "Management Study Guide" amply illustrate, the Circular prescribes quintessentially *managerial* decisionmaking, and its application calls for the exercise of purely discretionary managerial judgments. See also Ketler, *Federal Employee Challenges to Contracting Out: Is There A Viable Forum?*, 111 Mil. L. Rev. 103, 108 (1986).

perts (see Supplement at IV-7 (staffing requirements), IV-16 (material & supply costs), IV-23 (utilities), IV-23 (insurance); see generally note 28, *infra*), and the Supplement makes clear that management's "informed judgment" is an essential ingredient of the decision-making process (see Supplement at IV-7). Thus it is not surprising—indeed it could hardly be otherwise—that the appeal procedures required by the Circular are internal to the agency and its expert personnel. Explicitly prohibited are "appeal outside the agency or a judicial review" (App. B, *infra*, para. 2) as well as any action subjecting the procedure and decision on appeal to "negotiation, arbitration, or agreement" (*id.* para. 7).

Partly because, as the Fourth Circuit put it, "[r]eliance on agency judgment is a recurring theme of the Circular and its accompanying Supplement" (*HHS* v. *FLRA*, 844 F.2d at 1092), "[a]ll of the courts which have considered the issue have held that [contracting-out decisions] under Circular A-76 are committed to agency discretion and are not subject to judicial review." *AFGE, Local 2017* v. *Brown*, 680 F.2d 722, 726 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983). See *HHS* v. *FLRA*, 844 F.2d at 1096. The courts have concluded that the Circular "provides no judicially enforceable substantive rights" (*National Maritime Union* v. *Commander, Military Sealift Command*, 632 F. Supp. 409, 417 (D.D.C. 1986), aff'd, 824 F.2d 1228 (D.C. Cir. 1987)), and that, in particular, government employees and their unions do not possess any legally cognizable interests under the Circular (*National Federation of Federal Employees* v. *Cheney*, 883 F.2d 1038 (D.C. Cir. 1989)).[27]

[27] The Circular is by no means unique in this regard; instead, "it has long been held that the executive branch may promulgate such instructions without creating rights and obligations enforceable by third par-

In short, because Circular A-76 was designed not to be legally binding, and because it simply provides guidelines for the exercise of managerial discretion, it does not endow federal employees and their unions with legally enforceable rights. The Circular therefore places no legally cognizable or enforceable constraints upon management's reserved authority for purposes of 5 U.S.C. 7106, and so cannot reasonably be construed to be one of the "applicable laws" to which that Section refers.

B. A Claim That Management Has Failed To Comply With The Circular Is Not A "Grievance"

Because the Circular is not an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2), a union or an employee complaint alleging that an agency has failed to comply with the Circular's provisions does not give rise to a "grievance" as that term is defined in Title VII. That is so both because of the definition itself—which refers to a "claimed violation • • • of any law, rule, or regulation affecting conditions of employment," but not to claimed violations of mere policy guidelines—and for a second, independent reason. If such a complaint were deemed to be a "grievance," as the respondents argue, allegations of management's failure to abide by the terms of the Circular would ultimately be subject to binding arbitration pursuant to 5 U.S.C. 7121(b)(3)(C). See pp. 7-8, *supra*. Such binding arbitration would make an outside arbitrator, rather than the agency, the final authority on compliance with the Circular and would thus fly in the face of the clear

ties" (*HHS* v. *FLRA*, 844 F.2d at 1095). For example, the Social Security Claims Manual considered in *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981), like Circular A-76, "has no legal force, and it does not bind the [agency]. Rather, it is • • • for internal use by [agency] employees."

directive of Section 7106 that "nothing in [Title VII] shall affect the authority of any • • • agency" to make decisions (in accordance with applicable laws) regarding contracting out.

1. Subjecting Agency Contracting-Out Decisions Under The Circular To Arbitral Review Would Impermissibly "Affect" Reserved Agency Authority

Congress in the management rights provision carefully preserved management's authority "to make determinations with respect to contracting out." It could not at the same time have intended that labor arbitrators would, in settling grievances, oversee managers' contracting-out decisions made pursuant to the Executive Branch's management guidelines.

As both the Fourth Circuit and the Ninth Circuit have concluded (*Defense Language Institute* v. *FLRA*, 767 F.2d at 1401; *HHS* v. *FLRA*, 844 F.2d at 1096), external oversight of agency determinations under Circular A-76 would inevitably lead to improper second-guessing of legitimate exercises of managerial discretion. Just as compliance with the Circular is not amenable to judicial oversight, it is also not amenable to arbitrators' oversight: "[B]ecause the Circular lacks meaningful standards to guide management's discretion, [an arbitrator's and] the Authority's review would confront the same difficulty that has led courts to hold that judicial review of an agency's contracting-out determination [under A-76] is unavailable." *Defense Language Institute* v. *FLRA*, 767 F.2d at 1401.

To be sure, the FLRA has declared that, in adjudicating grievances alleging a violation of Circular A-76, arbitrators are not to review managers' discretionary decisions, and must not substitute their judgment for that of agency management officials. *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas*

and AFGE, AFL-CIO, Local 2840, 22 F.L.R.A. 656, 661 (1986) (*Blytheville*). "However, where the entire decision-making process is permeated with discretion, as it is under the Circular, that substitution would be inevitable." *HHS* v. *FLRA*, 844 F.2d at 1092. Indeed, the very question whether a particular aspect of the Circular is or is not "discretionary" can itself be a matter of judgment with respect to which an arbitrator might disagree with agency management officials. See *HHS* v. *FLRA*, 844 F.2d at 1093.[28] The distinction between those determinations that are "discretionary" as that term is used in *Blytheville* and those that are not is not one that lends itself to a precise definition, and that case provided none.[29]

This definitional difficulty is exacerbated by the fact that, as this Court has repeatedly recognized, "the 'specialized competence of [labor] arbitrators pertains primarily to the law of the shop, not the law of the land.' " *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743 (1981) (quoting *Alexander* v. *Gardner-Denver Co.*,

[28] For example, although the FLRA upheld the arbitrator's determination in *Blytheville* itself, concluding that the challenged agency decision violated non-discretionary provisions of Circular A-76, the errors identified turned largely on matters of discretion. The arbitrator faulted the agency for incorrectly estimating in-house labor costs, including the grade level required for a temporary employee to perform the work and the extent to which contracting out would displace existing employees. Compare *Blytheville*, 22 F.L.R.A. at 662, with *HHS* v. *FLRA*, 844 F.2d at 1092-1093 (criticizing *Blytheville*).

[29] Although the FLRA stated in *Blytheville* that an arbitrator's review of contracting-out decisions is limited to determining whether "the agency violated mandatory provisions * * * [which] contain sufficiently specific standards to objectively analyze and review the agency's actions" (22 F.L.R.A. at 661), *Blytheville* offers little guidance regarding which provisions of Circular A-76 might, in the FLRA's view, satisfy that standard. See note 28, *supra*.

415 U.S. 36, 57 (1974)). Cf. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960). Since the distinction in any particular case between determinations that are reviewable under the *Blytheville* standard and those that are not will turn at least in part on the "law of the land"—*i.e.*, "the public law considerations underlying [5 U.S.C. 7106]" (*Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. at 743), the constraints that *Blytheville* purports to impose upon arbitral review of A-76 decisions are likely to prove ineffective. *HHS* v. *FLRA*, 844 F.2d at 1093.

The threat of improper arbitral intrusion into discretionary agency decisionmaking is heightened by the fact that under Title VII, review of arbitrators' rulings by the FLRA and by the courts is limited. See 5 U.S.C. 7122, 7123(a)(1). Under those provisions, if an arbitrator incorrectly disturbs a legitimate managerial decision, it is not clear that the agency could obtain meaningful review. See *United States Marshals Service* v. *FLRA*, 708 F.2d 1417 (9th Cir. 1983) (construing 5 U.S.C. 7122 and 7123(a)(1) to limit review); see also *United States Department of Justice* v. *FLRA*, 792 F.2d 25 (2d Cir. 1986) (same); *Overseas Education Ass'n* v. *FLRA*, 824 F.2d 61 (D.C. Cir. 1987) (same). Thus, management can have no assurance that an arbitral decision setting aside a proper managerial judgment will be corrected. See, *e.g.*, *Defense Language Institute* v. *FLRA*, 767 F.2d at 1401.

2. Increased Delays And Uncertainties Would Impermissibly "Affect" Agency Authority

Subjecting agencies' A-76 determinations to grievance and arbitration would also "affect" agency authority to make decisions concerning contracting out, in violation of the management rights provision, by injecting an unac-

ceptable element of uncertainty and delay into the government's contracting-out activity.

As the court of appeals acknowledged in this very case, the process of grievance and arbitration may take months, or even years, to run its course.[30] Pet. App. 7a. Accord, *HHS* v. *FLRA*, 844 F.2d at 1094. The FLRA—in a partial effort to cope with the intrusive effects of its rulings—has held that an arbitrator, upon determining that an agency's decision to contract out is in violation of the Circular, may not order outright cancellation of a contract; instead, he may order the agency to "reconstruct" the procurement action by which outside services were obtained. *Blytheville*, 22 F.L.R.A. at 661.[31] Thus, under the scenario contemplated by the FLRA, long after an agency has decided to contract work out and has accordingly entered into, and perhaps even completed, a contract with a private entity,

[30] Compare the expedited internal appeals process contemplated by the Supplement to the Circular, pursuant to which an appeal ordinarily must be filed within 15 working days of the agency's initial decision, and must then be conclusively resolved by the agency within 30 calendar days. App. B, *infra*, paras. 3, 6a.

[31] The FLRA explained the reconstruction process as follows (22 F.L.R.A. at 662):

> An agency in taking the action required by [a reconstruction] award must reconstruct the procurement process in accordance with the provisions which were previously not complied with and must determine on reconstruction whether the decision to contract out is now in accordance with law and regulation. If the decision to contract out can no longer be justified, the agency must determine whether considerations of cost, performance, and disruption override cancelling the procurement action and take whatever action is appropriate on the basis of that determination.

The agency's reconstruction, and its determination of the appropriate course in light of that reconstruction, might itself be subjected to Title VII grievance and arbitration.

the agency may be told by an arbitrator that the contracting-out decision is infirm and must be reconsidered under the conditions that existed when it was made. For a number of reasons, the prospect that a contracting-out determination may be declared invalid by an arbitrator long after the fact is not conducive to effective agency management.

First, the problems inherent in attempting to reconstruct the earlier conditions might lead prudent agency managers to put off implementing a contract pending the exhaustion of any grievance and arbitration proceedings. In order to avoid the disruption that a reconstruction order would entail, responsible management officials might determine that the appropriate course of action is to stay a decision to contract out until grievance and arbitration proceedings relating to the decision are resolved.[32] A delay to avoid the difficulties of reconstruction could itself lead to substantial inefficiencies, however, since "undue delay in implementing • • • a contract award • • • may, because of rapidly changing economic conditions, invalidate the original cost comparison." Ketler, *Federal Employee Challenges to Contracting Out: Is there a Viable Forum?*, 111 Mil. L. Rev. 103, 117 (1986). See *HHS* v. *FLRA*, 844 F.2d at 1094. The determination of the relative cost of in-house performance as compared to the cost of contracting out turns on economic factors that may rapidly become outdated; thus, where a contracting-out determination is challenged and goes to arbitration, the cost comparison on

[32] The court of appeals' refusal in this case to require negotiation about a union proposal to include a specific stay requirement in the collective bargaining agreement itself (see note 18, *supra*) does not eliminate the problem. Even in the absence of a specific provision requiring management to delay, management might choose to delay rather than to go ahead with a contract only to be ordered, after the fact, to reconstruct the procurement action.

which the determination was initially based may be inaccurate by the time the arbitrator finally reaches a decision.

There would also be substantial inefficiencies even if the cost comparison is still valid when the arbitrator renders his decision. Even in those cases, the agency will have been deterred – perhaps at substantial cost to the government – from implementing an efficient contracting-out decision during the pendency of the arbitration proceeding. Moreover, as Judge MacKinnon observed in his dissent in *EEOC* v. *FLRA* (744 F.2d at 860):

> Even if the grievance is eventually denied, and that denial is affirmed [by the FLRA], the prolonged litigation will have cast a cloud over the agency's contracting-out decision, subjected the decision to considerable delay, and wasted valuable agency assets on an essentially frivolous claim. This extraordinary potential for vexatious litigation will significantly infringe upon management's specifically designated right to make contracting-out decisions.

In addition, the uncertainties that would be added to the contracting-out process might well have an adverse effect on agencies' negotiations for goods and services. If unions and employees were able to resort to grievance and outside arbitration to challenge contracting-out decisions under the Circular, potential bidders presumably would realize that performance of the contract might not begin until long after the initial award, and that, if begun, performance might be interrupted in mid-stream. Bidders could therefore reasonably be expected to adjust their bids to account for these possibilities, and some potential bidders might decide, under the circumstances, not to submit a bid at all. See *HHS* v. *FLRA*, 844 F.2d at 1094.[33] Thus, the

[33] A bidder, of course, would not be entitled to participate in the grievance and arbitration proceeding. In contrast, the appeals mech-

cost of contracts to the government is likely to be increased, and in some cases inflation of bids could even result in skewing the ultimate contracting-out determination in favor of comparatively inefficient in-house performance by artificially boosting the cost of private-sector performance over the in-house cost. At the very least, introduction of the delays and uncertainties inherent in the grievance and arbitration process could be expected to increase the difficulties responsible agency officials would face in planning and controlling agency budgets.

In sum, Title VII compels the conclusion that agency contracting-out decisions may not be subjected to grievance and arbitration because such grievance and arbitration would "affect" management's reserved authority. The statute says that "nothing in this chapter [*i.e.*, Title VII] shall affect the authority of any management official of any agency [to make determinations regarding contracting out.]" 5 U.S.C. 7106(a). Title VII's grievance and arbitration provisions are, of course "in this chapter"; the statutory language thus means that "nothing in" those grievance and arbitration provisions "shall affect" management's reserved contracting out authority.[34] See *HHS*

anism contemplated by the Circular includes bidders as well as unions and employees. As the Circular recognizes (App. B, *infra*, para. 7), this inclusion would be thwarted by labor arbitration:

> Since the appeal procedure is intended to protect the rights of all directly affected parties – Federal employees and their representative organizations, and bidders or offerors on the instant solicitation – the procedure and the decision on appeal may not be subject to negotiation, arbitration or agreement.

[34] The FLRA itself has explained (*American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 F.L.R.A. 314, 319-321 (1981)):

> Under the plain language of section 7106(a), of course, "nothing" in the Statute shall "affect the authority" of an agency to exercise

v. *FLRA*, 844 F.2d at 1099; *Defense Language Institute* v. *FLRA*, 767 F.2d at 1402.[33]

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the rights enumerated therein. Hence, no matter could be grieved under a procedure negotiated pursuant to section 7121 of the Statute which would deny the authority of an agency to exercise its statutory rights under section 7106.

[33] Because "substantive management rights [would] realistically be[ ] impaired" if the union's bargaining proposal were to be adopted (*National Federation of Federal Employees, Local 615* v. *FLRA*, 801 F.2d 477, 483 (D.C. Cir. 1986)), it is incorrect to suggest, as did the court of appeals in *EEOC*, 744 F.2d at 848 (but not the FLRA in the instant case), that agency compliance with the Circular is negotiable under 5 U.S.C. 7106(b) as a *procedure* used in the exercise of a reserved management right. As the Fourth Circuit explained in *HHS* v. *FLRA*, *supra*, while "[t]here can be no doubt that Circular A-76 is, to some extent, procedural" (844 F.2d at 1097), the effect of subjecting agency implementation of the Circular to negotiation and arbitration would extend far beyond procedure, and would directly affect substantive rights. Cf. *Defense Language Institute* v. *FLRA*, 767 F.2d 1398, 1400-1401 & n.3 (9th Cir. 1985) (proposal that would require correction of data not prepared in accordance with Circular A-76 is not procedural in nature, and therefore is not negotiable); Pet. App. 6a-7a (holding non-negotiable a union proposal requiring agency to complete arbitration before contracting out).

In addition, the union proposal would directly affect the substantive rights of non-governmental parties. Substituting the collective bargaining agreement's grievance and third-party arbitration provisions for the Circular's existing internal appeal mechanisms would give agency employees and their unions enforceable rights to challenge substantive agency decisions that are expressly denied to them under the Circular and its Supplement. See App. A, *infra*, para. 7c(8); App. B, *infra*, para. 2. Moreover, the Circular's appeal mechanisms, but not the collective bargaining agreement grievance and arbitration procedures, provide for participation by "bidders or offerors on the [affected] solicitation" (App. A, *infra*, para. 6g; App. B, *infra*, para. 1). Since the union's proposal would supplant the appeal procedures required by the Circular, it would diminish the rights of disappointed bidders to protest agency actions (see note 33, *supra*).

* * * * *

Contrary to the respondents' suggestions (NTEU Memorandum at 11-12; FLRA Memorandum at 17), we do not contend that any complaint by an employee or a union that bears on a reserved management right is, for that reason alone, exempt from Title VII's grievance and arbitration provisions. Instead, the conclusion that complaints alleging violations of the Circular are not subject to grievance and arbitration flows from the fact that the Circular *both* involves the exercise of a reserved management prerogative (contracting out) *and* is not an "applicable law" qualifying that prerogative. Accordingly, a complaint alleging that management has not adhered to the Circular in making a contracting-out determination does not give rise to a "grievance" within the meaning of the statute (see 5 U.S.C. 7103(a)(9)).

Moreover, and contrary to the union's apparent belief,[34] our position is not that a complaint alleging violation of the Circular is a "grievance" that is exempt from the statute's grievance and arbitration provisions. Rather, our position is that a complaint alleging a violation of the Circular is not a "grievance" at all within the meaning of the statute. In ruling in this case that a complaint alleging a violation of the Circular constitutes a "grievance," the FLRA alluded to 5 U.S.C. 7103(a)(9)(C)(ii), which defines the term to include "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." See Pet. App. 12a-13a. Cf. *EEOC* v. *FLRA*, 476 U.S. at 22. As we have

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[34] See NTEU Memorandum at 5, 14 (citing 5 U.S.C. 7121(c)); see also Pet. App. 14a; *EEOC* v. *FLRA*, 744 F.2d at 849-850; *HHS* v. *FLRA*, 844 F.2d at 1105-1106 (dissenting opinion)).

shown, however, the Circular, which simply guides the exercise of agency discretion, is quite plainly neither a "law" nor a "regulation." Cf. *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981). Nor is there any reason to conclude that it is a "rule." Giving such an expansive definition to that undefined term would mean that by its mere inclusion in the definition of a "grievance," Congress intended to permit the grievance and arbitration mechanism to override the explicit mandate of the management rights provision that "nothing in this chapter"—including the scope of the term "grievance"—"shall affect" management's reserved authority with respect to contracting out.[37]

II. THE DECISION BELOW IS INCONSISTENT WITH THE STATUTORY PURPOSE

The scope and application of the management rights provision, and its relation to the other statutory provisions, are confirmed by an analysis of the statutory purpose. A basic tenet of the federal labor relations scheme enacted in Title VII is the "paramount public interest"

[37] For the foregoing reasons, we contend that Circular A-76 is neither an "applicable law" under Section 7106 nor a "law, rule, or regulation" under Section 7103's definition of a "grievance." If this Court disagrees, and concludes that the Circular is either a law, rule, or regulation for purposes of these provisions, we believe such a conclusion would mean that the union's proposal is not negotiable because of 5 U.S.C. 7117(a)(1), which provides that the duty to bargain exists only "to the extent not inconsistent with any Federal law or any Government-wide rule or regulation." Circular A-76, which "[u]nless otherwise provided by law • • • appl[ies] to all executive agencies" (App. A, *infra*, para. 7a), and is designed to "establish[] Federal policy" (*id.* para. 1), applies "Government-wide." And the union's proposal to substitute a grievance procedure and outside arbitration for the Circular's internal appeal mechanism is fundamentally "inconsistent with" the Circular's exclusion of arbitration (see App. B, *infra*, para. 7).

(*FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. at 1262) in "preserving the ability of federal managers to maintain 'an effective and efficient government'" (*Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92 (quoting 5 U.S.C. 7101(b))).[38] As President Carter emphasized in his message to Congress urging that the Civil Service Reform Act be passed, "this legislation • • • recogniz[es] the special requirements of the Federal government and the paramount public interest in the effective conduct of the public's business." H.R. Doc. No. 299, 95th Cong., 2d Sess. 4 (1978). Congress in turn took pains to "insure[ ] to Federal agencies the right to manage government operations efficiently and effectively" (S. Rep. No. 969, *supra*, at 12),[39] and ultimately admonished in the very terms of the statute itself that "[t]he provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government" (5 U.S.C. 7101(b)). This Court has recognized that requirement as "one of the major purposes of the [Civil Service Reform] Act." *Cornelius* v. *Nutt*, 472 U.S. 648, 662 (1985)

The decision of the court below disregards that major purpose. As our discussion shows, the implementation of the union's proposal in this case would result in delays and uncertainties that would significantly increase the difficulties in administering the federal policy regarding contracting out. The interpretation of the court below that

[38] The D.C. Circuit itself has recognized that a "key policy" underlying the statutory provisions is the promotion of "efficiency in government" (*National Federation of Federal Employees, Local 1745* v. *FLRA*, 828 F.2d 834, 839 n.31 (D.C. Cir. 1987); see also *Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 857 F.2d 819, 822 (D.C. Cir. 1988)).

[39] See also, *e.g.*, H.R. Conf. Rep. No. 1717, *supra*, at 154.

this increase is not only permitted, but indeed mandated, by Title VII does not promote "efficiency in government"; it encourages just the opposite. See *HHS* v. *FLRA*, 844 F.2d at 1100.

Respondents' interpretation of the statutory scheme is thus inconsistent with the requirements of government efficiency. The Circular is, in essence, the method the President[40] has utilized to provide agency management officials with guidance on how they should go about exercising the reserved right to make contracting-out determinations. As such, it is binding only in the sense that compliance is directed as a matter of internal Executive Branch policy. Ultimately, compliance with the Circular is satisfactory only if and to the extent that the President says it is.

Yet under respondents' reading of Title VII, the promulgation of this internal policy guidance automatically gives agency employees and their unions a right to subject interpretation of that guidance to adjudication by independent arbitrators. As the Fourth Circuit explained (*HHS* v. *FLRA*, 844 F.2d at 1095), "[w]ere the Circular held to be an 'applicable law' within the meaning of § 7106 [whose alleged violation would give rise to an arbitrable grievance], it would be impossible for the executive branch to formulate policy directives, and for the President to instruct his subordinates, without giving rise to third party rights to challenge those policies and instructions."

The respondents' reading of Title VII, which would have the perverse effect of "transform[ing] basic tools of management into occasions for intrusion" (*HHS* v. *FLRA*, 844 F.2d at 1100), is thus contrary to the directive of Section 7101(b). Congress could not have intended, in enacting Title VII, to present Executive officials "with the Hobson's choice of surrendering control over the interpretation of policy directives or attempting to manage without such instructions to subordinates." *HHS* v. *FLRA*, 844 F.2d at 1100.[41] To the contrary, the legislative history confirms that the management rights provision "specifies areas for decision which are reserved to the *President* and *heads of agencies*," in order to "insure[] to Federal agencies the right to manage government operations efficiently and effectively" (S. Rep. No. 969, *supra*, at 12-13 (emphasis added)).

We recognize that the FLRA's "reasonable and defensible constructions of [its] enabling Act" are entitled to deference. *FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. at 1263. This Court has admonished, however, that "reviewing courts • • • must not 'rubber-stamp • • • administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " *Ibid.*; *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 97 (quoting *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965)). Here, as in those cases, the FLRA's interpretation is "inconsistent[]

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[40] OMB is an office within the Executive Office of the President (31 U.S.C. 501), and serves as "the President's principal arm for the exercise of his managerial functions" (31 U.S.C. 501 note (Reorg. Plan No. 2 of 1970)).

[41] As one commentator has observed (Ketler, *supra*, 111 Mil. L. Rev. at 139-140):

> If agency contracting officers at the lowest levels were merely delegated the authority to contract out in their sole discretion, no "applica[ble] laws" would exist to provide a basis for employee grievances. It is ludicrous to conclude that Congress intended by section 7106(a) to preserve the discretion of first-line managers to determine the factors upon which to make contracting-out decisions, but to deny senior management officials that same discretion to determine uniform conditions for contracting out on an agency-wide basis.

with the language and purpose of Title VII" (*FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. at 1263), and thus the court of appeals erred in failing to set that interpretation aside.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1989

* The Solicitor General is disqualified in this case.

APPENDIX A

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

[SEAL]

August 4, 1983 CIRCULAR NO. A-76 (REVISED)

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Performance of Commercial Activities

1. *Purpose.* This Circular establishes Federal policy regarding the performance of commercial activities. The Supplement to the Circular sets forth procedures for determining whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel.

2. *Recission.* OMB Circular No. A-76 (revised), dated March 29, 1979; Transmittal Memoranda 1 through 7; Supplement No. 1 to the Circular, dated March 1979.

3. *Authority.* The Budget and Accounting Act of 1921 (31 U.S.C. 1 *et seq.*), and The Office of Federal Procurement Policy Act Amendments of 1979 (41 U.S.C. 401 *et seq.*).

4. *Background.*

a. In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and

continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.

b. This national policy was promulgated through Bureau of the Budget Bulletins issued in 1955, 1957 and 1960. OMB Circular No. A-76 was issued in 1966. The Circular was revised in 1967 and again in 1979.

5. *Policy*. It is the policy of the United States Government to:

a. *Achieve Economy and Enhance Productivity*. Competition enhances quality, economy, and productivity. Whenever commercial sector performance of a Government operated commercial activity is permissible, in accordance with this Circular and its Supplement, comparison of the cost of contracting and the cost of in-house performance shall be performed to determined who will do the work.

b. *Retain Governmental Functions In-House*. Certain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees. These functions are not in competition with the commercial sector. Therefore, these functions shall be performed by Government employees.

c. *Rely on the Commercial Sector*. The Federal Government shall rely on commercially available sources to provide commercial products and services. In accordance with the provisions of this Circular, the Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source.

6. *Definitions*. For purposes of this Circular:

a. A *commercial activity* is one which is operated by a Federal executive agency and which provides a product

or service which could be obtained from a commercial source. A commercial activity is not a Governmental function. A representative list of such activities is provided in Attachment A. A commercial activity also may be part of an organization or a type of work that is separable from other functions or activities and is suitable for performance by contract.

b. A *conversion to contract* is the changeover of an activity from Government performance to performance under contract by a commercial source.

c. A *conversion to in-house* is the changeover of an activity from performance under contract to Government performance.

d. A *commercial source* is a business or other non-Federal activity located in the United States, its territories and possessions, the District of Columbia or the Commonwealth of Puerto Rico, which provides a commercial product or service.

e. A *Governmental function* is a function which is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Services or products in support of Governmental functions, such as those listed in Attachment A, are commercial activities and are normally subject to this Circular. Governmental functions normally fall into two categories:

(1) *The act of governing*; i.e., the discretionary exercise of Government authority. Examples include criminal investigations, prosecutions and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of

the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.

(2) *Monetary transactions and entitlements,* such as tax collection and revenue disbursements; control of the treasury accounts and money supply; and the administration of public trusts.

f. A *cost comparison* is the process of developing an estimate of the cost of Government performance of a commercial activity and comparing it, in accordance with the requirements in Parts II, III, and IV of the Supplement, to the cost to the Government for contract performance of the activity.

g. *Directly affected parties* are Federal employees and their representative organizations and bidders or offerors on the instant solicitation.

7. *Scope.*

a. Unless otherwise provided by law, this Circular and its Supplement shall apply to all executive agencies and shall provide administrative direction to heads of agencies.

b. This Circular and its Supplement apply to printing and binding only in those agencies or departments which are exempted by law from the provisions of Title 44 of the U.S. Code.

c. This Circular and its Supplement shall not:

(1) Be applicable when contrary to law, Executive Orders, or any treaty or international agreement;

(2) Apply to Governmental functions as defined in paragraph 6.e;

(3) Apply to the Department of Defense in times of a declared war or military mobilization;

(4) Provide authority to enter into contracts;

(5) Authorize contracts which establish an employer-employee relationship between the Government and contractor employees. An employer-employee relationship involves close, continual supervision of individual contractor employees by Government employees, as distinguished from general oversight of contractor operations. However, limited and necessary interaction between Government employees and contractor employees, particularly during the transition period of conversion to contract, does not establish an employer-employee relationship. Additional guidance on this subject is provided in the Federal Personnel Manual issued by the Office of Personnel Management;

(6) Be used to justify conversion to contract solely to avoid personnel ceilings or salary limitations;

(7) Apply to the conduct of research and development. However, severable in-house commercial activities in support of research and development, such as those listed in Attachment A, are normally subject to this Circular and its Supplement; or

(8) Establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in Part I, Chapter 2, paragraph I of the Supplement, "Appeals of Cost Comparison Decisions."

8. *Government Performance of a Commercial Activity.* Government performance of a commercial activity is authorized under any of the following conditions:

a. *No Satisfactory Commercial Source Available.* Either no commercial source is capable of providing the needed product or service, or use of such a source would cause unacceptable delay or disruption of an essential program. Findings shall be supported as follows:

(1) If the finding is that no commercial source is capable of providing the needed product or service, the efforts made to find commercial sources must be documented and made available to the public upon request. These efforts shall include, in addition to consideration of preferential procurement programs (see Part I, Chapter 3, paragraph C of the Supplement), at least three notices describing the requirement in the *Commerce Business Daily* over a 90-day period or, in cases of *bona fide* urgency, two notices over a 30-day period. Specifications and requirements in the solicitation shall not be unduly restrictive and shall not exceed those required of in-house Government personnel or operations.

(2) If the finding is that a commercial source would cause unacceptable delay or disruption of an agency program, a written explanation, approved by the assistant secretary or designee in paragraph 9.a. of the Circular, must show the specific impact on an agency mission in terms of costs and performance. Urgency alone is not adequate reason to continue in-house operation of a commercial activity. Temporary disruption resulting from conversion to contract is not sufficient support for such a finding, nor is the possibility of a strike by contract employees. If the commercial activity has ever been performed by contract, an explanation of how the instant circum-

stances differ must be documented. These decisions must be made available to the public upon request.

(3) Activities may not be justified for in-house performance solely on the basis that the activity involves or supports a classified program or the activity is required to perform an agency's basic mission.

b. *National Defense.*

(1) The Secretary of Defense shall establish criteria for determining when Government performance of a commercial activity is required for national defense reasons. Such criterial shall be furnished to the Office of Federal Procurement Policy, OMB, upon request.

(2) Only the Secretary of Defense or his designee has the authority to exempt commercial activities for national defense reasons.

c. *Patient Care.* Commercial activities performed at hospitals operated by the Government shall be retained in-house if the agency head, in consultaion with the agency's chief medical director, determines that in-house performance would be in the best interests of direct patient care.

d. *Lower cost.* Government performance of a commercial activity is authorized if a cost comparison prepared in accordance with Parts II, III and IV of the Supplement demonstrates that the Government is operating or can operate the activity of an ongoing basis at an estimated lower cost than a qualified commercial source.

9. *Action Requirements.* To ensure that the provisions of this Circular and its Supplement are followed, each agency head shall:

a. Designate an official at the assistant secretary or equivalent level and official at a comparable level in major

component organizations to have responsibility for implementation of this Circular and its Supplement within the agency.

b. Establish one or more offices as central points of contact to carry out implementation. These offices shall have access to all documents and data pertinent to actions taken under the Circular and its Supplement and will respond in a timely manner to all requests concerning inventories, schedules, reviews, results of cost comparisons and cost comparison data.

c. Be guided by OFPP Policy Letter No. 78-3, "Requests for Disclosure of Contract-Supplied Information Obtained in the Course of a Procurement," in considering requests for information supplied by contractors.

d. Implement this Circular and its Supplement within 90 days after its issuance with a minimum of internal instructions. Cost comparisons shall not be delayed pending issuance of such instructions. Copies of the implementing instructions and any subsequent changes, the appeals procedure required in Part I, Chapter 2, paragraph I of the Supplement, and the names of the designated officials in paragraph 9.a. and the offices in paragraph 9.b. will be forwarded to the Office of Federal Procurement Policy, OMB.

e. Ensure the initial reviews of all existing in-house commercial activities are completed in accordance with Part I, Chapter I, paragraph C.1. of the Supplement by September 30, 1987.

10. *Annual Reporting Requirement.* No later than March 15 of each year, agencies shall submit to the Office of Federal Procurement Policy a report on the implementation of OMB Circular No. A-76, in accordance with instructions in Part I, Chapter 4 of the Supplement.

11. *OMB Responsibility and Contact Point.* All questions or inquiries should be submitted to the Office of Management and Budget, Office of Federal Procurement Policy, 726 Jackson Place, NW, Room 9013, Washington, DC 20503. Telephone number (202) 395-6810.

12. *Effective Date.* This Circular and its Supplement are effective immediately, but need not be applied where a cost comparison was begun, using the March 1979 Circular, prior to the effective date.

13. *Review.* The policy in this Circular will be reviewed no later than four years from the date of issuance.

/s/ DAVID A. STOCKMAN
David A. Stockman
Director

Attachment A
OMB Circular No. A-76

EXAMPLES OF COMMERCIAL ACTIVITIES[1]

Audiovisual Products and Services

- Photography (still, movie, aerial, etc.)
- Photographic processing (developing, printing, enlarging, etc.)
- Film and videotaping production (script writing, direction, animation, editing, acting, etc.)
- Microfilming and other microforms
- Art and graphics services
- Distribution of audiovisual materials
- Reproduction and duplication of audiovisual products
- Audiovisual facility management and operation
- Maintenance of audiovisual equipment

Automatic Data Processing

- ADP services—batch processing, time-sharing, facility management, etc.
- Programming and systems analysis, design, development, and simulation

[1] This list should be used in conjunction with the policy and procedures of the Circular to determine an agency's A-76 commercial activities inventory. It has been compiled primarily from examples of commercial activities currently contracted or operated in-house by agencies. It should not be considered exhaustive, but should be considered an aid in identifying commercial activities. For example, some Federal libraries are primarily recreational in nature and would be deemed commercial activities. However, the National Archives or certain functions within research libraries might not be considered commercial activities. Agency management must use informed judgment on a case-by-case basis in making these decisions.

- Key punching, data entry, transmission, and teleprocessing services
- Systems engineering and installation
- Equipment installation, operation, and maintenance

Food Services

- Operation of cafeterias, mess halls, kitchens, bakeries, dairies, and commissaries
- Vending machines
- Ice and water

Health Services

- Surgical, medical, dental, and psychiatric care
- Hospitalization, outpatient, and nursing care
- Physical examinations
- Eye and hearing examinations and manufacturing and fitting glasses and hearing aids
- Medical and dental laboratories
- Dispensaries
- Preventive medicine
- Dietary services
- Veterinary services

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APPENDIX B

1. APPEALS OF COST COMPARISON DECISIONS

1. Each agency shall establish an administrative appeals procedure to resolve questions from directly affected parties relating to (1) determinations resulting from cost comparisons performed in compliance with this Circular and Part IV of the Supplement and (2) justifications to convert to contract without a cost comparison in accordance with the criteria in Part I, Chapter 2, paragraph A. The appeal procedure will *not* apply to questions concerning:

a. Award to one contractor in preference to another; or

b. Government management decisions.

2. The appeals procedure is to provide an administrative safeguard to ensure that agency decisions are fair and equitable and in accordance with procedures in Part IV of this Supplement. The procedure does not authorize an appeal outside the agency or a judicial review.

3. The appeals procedure must be independent and objective and provide for a decision within 30 calendar days of receipt of the appeal. The decision shall be made by an impartial official at a level organizationally higher than the official who approved the original decision. The original appeal decision shall be final unles the agency procedures provide for further discretionary review within the agency.

4. All detailed documentation supporting the initial cost comparison decision shall be made available to directly affected parties upon request when the initial decision is announced. If the documentation is not available at that time, the 15-day appeal period shall be extended the number of days equal to the delay.

5. The detailed documentation shall include, at a minimum, the in-house cost estimate with detailed supporting data, the completed cost comparison form the name of the winning contractor (if the decision is to contract out), or the price of the bidder whose proposal would have been most advantageous to the Government (if the decision is to perform in-house).

6. To be considered eligible for review under the agency appeals procedure, appeals must:

a. Be received by the agency in writing within 15 working days after the date the supporting documentation is made available to directly affected parties. The agency may extend the appeal period to a maximum of 30 working days if the cost study is particularly complex;

b. Address specific line items on the Cost Comparison Form (Illustration 1-1 or 5-1, Part IV) and set forth the rationale for questioning those items; and

c. Demonstrate that the result of the appeal may change the cost comparison decision.

7. Since the appeal procedure is intended to protect the rights of all directly affected parties—Federal employees and their representative organizations, and bidders or offerors on the instant solicitation—the procedure and the decision upon appeal may not be subject to negotiation, arbitration, or agreement.

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